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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 469

ANNE FEINBERG,

Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

SUPPORTING BRIEF.

EARL EDWIN SEYFARTH,
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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

SUBJECT INDEX.

PAGE

Appendix 15

Argument 7-14

Summary of Argument.

I.

The statute declares void every attempted limitation of liability in a carrier's rules, receipts and tariffs—except where the shipper declares or agrees in writing to a declared or released value..... 7-10

49 U. S. C. A. 20 (11)—See Appendix.

Caten v. *Salt City Movers & Storage Co., Inc.*, 149 F. (2d) 428.

The decision of the Circuit Court of Appeals upholding limitation provisions in respondent's rules, receipts and tariffs, is clearly erroneous—as petitioner never declared or agreed to any value in writing..... 9

II.

A truck driver not in a shipper's employ has no implied authority to bind the shipper to a limitation of the carrier's liability.....10-11

New v. *Chicago, etc. Ry. Co.*, 171 Ill. App. 488.

Hill v. *Adams Express Co.*, 77 N. J. L. 19, 71 Atl. 683.

Benson v. *Oregon, etc. R. R. Co.*, 35 Utah 241, 99 Pac. 1072.

Seller v. *Steamship, Pacific*, 21 Fed. Cas. No. 12, 644 Deady 17, 1 Ore. 409.

Grice v. *Oregon-Washington R. & N. Co.*, 78 Ore. 17, 150 Pac. 862.
Scranton v. *Southern Pacific Ry. Co.*, 77 Cal. App. 132, 245 Pac. 1102.
10 C. J. 147, Sec. 186.
9 Am. Jur. 872, Sec. 736.

The truck driver who delivered petitioner's coat to respondent had neither express nor implied authority to limit the carrier's liability, respondent had actual and constructive notice of his lack of authority, and petitioner is not bound by any limitation of liability by said truck driver..... 11

III.

After goods have been shipped and lost, the subsequent receipt and retention of a shipping receipt by the shipper does not constitute an assent thereto, as it is then too late to repudiate the receipt and recover back the shipper's goods.....12-13

Hunter v. *American Ry. Express Co.*, (Mo. App.) 4 S. W. (2d) 847, 851.
Adams Express Co. v. *Darden*, 265 U. S. 265, 267, 68 L. ed. 1010.
Merchant's Despatch Transportation Co. v. *Joesting*, 89 Ill. 152, 155.
Michigan Central R. R. Co. v. *Boyd*, 91 Ill. 268, 272.
Waldron v. *Fargo*, 170 N. Y. 130, 136, 62 N. E. 1077, 1078.
Benson v. *Oregon S. L. R. R. Co.*, 35 Utah 241, 246-47, 99 Pac. 1072, 1074.

Petitioner never knew of respondent's receipt until after her coat had been shipped and lost, and her subsequent retention of the receipt did not bind her to its terms..... 13

IV.

None of the cases relied upon by the Circuit Court of Appeals are in point or support the opinion of said court 13-14

Table of Authorities.

Adams Express Co. v. Darden, 265 U. S. 265, 267, 68 L. ed. 1010 12
Benson v. Oregon, etc. R. R. Co., 35 Utah 241, 99 Pac. 1072 ..... 11, 13
Caten v. Salt City Movers and Storage Co., Inc., 149 F. (2d) 428 ..... 8, 9
Chatz v. Armour Plant Employees Credit Union, 154 F. (2d) 236, 239 12
Grice v. Oregon-Washington R. & N. Co., 78 Ore. 17, 150 Pac. 62 11
Hill v. Adams Express Co., 77 N. J. L. 19, 71 Atl. 683 .. 11
Hunter v. American Ry. Express Co., (Mo. App.) 4 S. W. (2d) 847, 851 ..... 12, 13, 14
Merchant's Despatch Transportation Co. v. Joesting, 89 Ill. 152, 155 12
Michigan Central R. R. Co. v. Boyd, 91 Ill. 268, 272 12
New v. Chicago, etc. Ry. Co., 171 Ill. App. 488 11
Plaff v. Pacific Express Co., 159 Ill. App. 493, 498 10
O. & M. Ry. Co. v. Hamlin, 42 Ill. App. 441, 442 12
Scranton v. Southern Pacific Ry. Co., 77 Cal. App. 132, 245 Pac. 1102 11
Seller v. Steamship, Pacific, 21 Fed. Cas. No. 12,644, Deady 17, 1 Ore. 409 11
Waldron v. Fargo, 170 N. Y. 130, 136, 62 N. E. 1077, 1078 12
2 C. J. 575 11
10 C. J. 147, Sec. 186 11
2 Am. Jur. 81, 85 11
9 Am. Jur. 872, Sec. 736 11

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ANNE FEINBERG,

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Anne Feinberg, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, reversing a judgment of the District Court of the United States for the Northern District of Illinois.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit to recover the value of petitioner's mink fur coat, lost by respondent in an interstate shipment. Respondent contended that its liability was limited to $50, by reason of a $50 valuation inserted by it in its receipt, and made binding upon petitioner by its rules and tariffs.

Petitioner contended that she never authorized said valuation, never knew of the receipt until long after the coat was shipped and lost, and could not be bound by said rules and tariffs expressly declared void by federal statute. The trial court gave judgment for petitioner for the value of her coat, $4,880 (T. 47-50). The Circuit Court of Appeals reversed (T. 75-78).

On March 5, 1946, while a guest at the Hotel Biltmore in Phoenix, Arizona, petitioner wrapped and addressed her coat for shipment to Chicago, and her husband delivered it to a bell boy at the hotel with instructions to have the porter deliver it to the Railway Express Company (T. 22, 43-44). He said nothing to the bellboy about the contents of the package, declaring any value, limiting liability, paying carriage charges, or anything else (T. 23).

On the same day, the coat was delivered to respondent by a truck driver in the hotel's employ, who had found it in his truck (T. 37). Petitioner had no contact with said truck driver, and never authorized him to enter into any written agreement or declaration as to value on her behalf (T. 37, 44).

It was the established custom for the hotel porter to fill out receipts at the hotel for shipments by hotel guests —of which custom respondent was aware (T. 39-41). However, the custom was departed from in this case, and no receipt or declaration of value was made out in petitioner's presence at the hotel, and none accompanied this shipment to respondent (T. 41-42).

Respondent's agent undertook to make out the receipt, and asked the truck driver for the contents and value of the package (T. 38-39). The truck driver said he didn't know the contents, could place no value thereon, didn't know anything about it, and to put on the minimum value of $50 (T. 39, 26 and 64). Respondent's agent then filled

out the receipt, inserted a $50 valuation therein, and handed the receipt to the truck driver (T. 26, 39, 45).

On March 6th the coat was stolen enroute (T. 25-26).

The receipt handed to the truck driver was not discovered or known about by petitioner until March 7th, when her husband found it in their hotel box—two days after the coat was shipped, and one day after it had been lost by respondent (T. 24).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 29, 1947 (T. 75). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule 38 (5) (b) of this Court.

QUESTIONS PRESENTED.

The questions presented are:

1. Whether the respondent carrier's rules and tariffs can impose a $50 limitation of its liability upon the petitioner shipper—contrary to the federal statute declaring void all limitations of liability in any contract, rule, receipt or filed tariff, except where the shipper has declared or agreed in writing to a declared or released value?

2. Whether ordinary agency rules, holding that a truck driver has no implied authority to bind a shipper to a limitation of a carrier's liability, can be rejected in deciding a case arising under the Interstate Commerce Act?

3. Whether the trial court's finding of want of authority in the truck driver should be reversed by the Circuit Court of Appeals when all the evidence supports such finding and respondent introduced no contrary evidence?

4. Whether petitioner is bound by respondent's receipt, which she never authorized or knew about until long after her coat had been delivered and lost by the carrier?

REASONS RELIED ON FOR ALLOWING THE WRIT.

The general reasons relied upon for the allowance of the writ herein are:

1. The decision of the Circuit Court of Appeals that respondent's rules and tariff schedules were "conclusive", and made its receipt binding on petitioner "as to the amount she could collect in case of loss" (T. 78)—despite the fact that no written declaration of value by petitioner had been obtained, as required by statute—violates the provisions of Section 20 (11) of the Interstate Commerce Act, presents an important question of federal law which should be settled by this court, and is in square conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Caten* v. *Salt City Movers and Storage Co., Inc.*, 149 F. (2) 428, holding that there can be no such limitation of the carrier's liability except where there is a written declaration or agreement by the shipper as to a declared or released value.

2. The decision of said court that petitioner was bound by the valuation declared by a "hotel clerk" decides an important question of local law in a way in conflict with applicable local decisions, and departs from the accepted course of judicial proceedings in that (1) no hotel clerk is involved, (2) the truck driver making the delivery to respondent expressly stated that he could declare no value thereon, (3) the trial court found that no such authority existed, and (4) all the decisions hold that a truck driver has no implied authority to bind a shipper to a limitation of the carrier's liability.

3. The decision of said court that petitioner was bound to repudiate the receipt, even though it did not come to her knowledge or possession until after the coat had been shipped and lost, is in conflict with the applicable decisions, holding that the shipment contract must be made at the time of the shipment, and that after a shipment has been delivered to and lost by the carrier, it is too late for a shipper to repudiate the transaction and recover back his goods, and thereafter he need do nothing with respect to the receipt.

Wherefore, petitioner prays that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit may be granted, and that upon the hearing, the judgment of said Circuit Court of Appeals be reversed and the judgment of the trial court affirmed.

Anna Tenenberg
Petitioner,

By Karl Edwin Spofarth
Counsel for Petitioner.

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Petitioner,

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RAILWAY EXPRESS AGENCY, INCORPORATED,

Respondent.

SUPPORTING BRIEF.

MAY IT PLEASE THE COURT:

The short, unsatisfactory opinion of the Circuit Court of Appeals runs counter to Section 20 (11) of the Interstate Commerce Act (See Appendix), and deprives the shipper of the protection sought to be given him thereby. If left undisturbed, this decision will become a dangerous precedent which will defeat the rights of thousands of shippers under the Act.

I.

DEFENDANT'S RULES CANNOT OVERRIDE THE STATUTE.

The Circuit Court of Appeals ignored the statute involved, and relied upon defendant's rules, receipt and tariffs, containing limitation of liability provisions expressly declared void by the statute. Thereby the opinion

effectively nullifies the statutory requirement of a written declaration of value by the shipper as a prerequisite to an effective limitation of a carrier's liability.

In order to protect shippers, Congress provided in Section 20 (11) of the Interstate Commerce Act that an interstate carrier shall issue a receipt and be liable to the holder thereof for all loss "notwithstanding any limitation of liability or * * * amount of recovery or representation or agreement as to value" in any receipt, bill of lading, contract, rule, regulation, or filed tariff, and that any such limitation shall be "unlawful and void" regardless of its manner or form (49 U. S. C. A. 20 (11)). See appendix for statute.

The only exception to the above is where the carrier establishes and maintains rates dependent upon a "value declared in writing by the shipper or agreed upon in writing as the released value of the property * * *"

Congress clearly intended that **no** limitation of liability or declared value in a contract, receipt, rule or tariff should be valid unless the shipper declares or agrees to a value in writing. Such is the construction placed upon the statute by the Court of Appeals for the Second Circuit in *Caten* v. *Salt City Movers and Storage Co., Inc.,* 149 F. (2d) 428, where the court said:

> "So as the law now stands the only limitation of liability permitted is conditioned upon a compliance with the proviso of which the material part has already been quoted. Any attempt to limit liability is prohibited except upon a declaration of value by the shipper in writing or upon a released value agreed to in writing.
>
> • • • • •
>
> "The statute makes it abundantly clear that the carrier's common law liability for full actual damages, whether or not caused by its negligence, is imposed

when it accepts goods for carriage, unless a certain specified agreement limiting that liability has been made as the result of an equally certain specified action by the shipper in respect to a voluntary valuation of his goods."

In the case at bar, the court ignored both the statute and the *Caten* Case, and relied upon the provisions of respondent's rules and form of receipt filed with its tariffs. The court quoted portions of respondent's receipt and rule 13, which together provide, in effect, that the carrier's liability is limited to a declared value of $50 in all cases unless the shipper has declared a higher value. The court concluded that the limitation of respondent's liability in its receipt was binding on petitioner because respondent's filed tariff is "conclusive" (T. 78).

The effect of this holding is to limit respondent's liability to $50, even though petitioner declared no value in writing. Such result is clearly contrary to the statute —which expressly declares void all limitations of liability in receipts, rules and filed tariffs—except where the shipper has made a written declaration or agreement as to value.

Such result is also contrary to the decision of the Circuit Court of Appeals in the *Caten* Case (149 F. (2d) 428), where it was held that any attempt to limit liability is prohibited except upon "a declaration of value by the shipper in writing or upon a released value agreed to in writing."

The opinion is wholly illogical in declaring the rule in respondent's tariff to be "conclusive". If a written agreement or declaration as to value by the petitioner exists, such declaration or agreement would be conclusive, and respondent's rules and tariffs would be immaterial; but if no such written declaration or agreement by petitioner exists, then all of respondent's rules and tariffs are void

in so far as they seek to limit its liability. Respondent's rules and tariffs cannot prevail over the statute. The trial court's judgment should have been affirmed.

This plain nullification of the statute, obvious conflict with the *Caten* decision, and illogical consideration of the issue—on an important Federal Statute and question of law—requires the issuance of the writ prayed for herein.

II.

THE TRUCK DRIVER HAD NO AUTHORITY TO LIMIT LIABILITY.

Equally faulty and unexplainable is the Appeal Court's consideration of the agency question. The opinion holds that a "hotel clerk" was petitioner's agent (T. 75, 77, 78). Strikingly, no hotel clerk is involved or known to this record.

The coat was delivered to respondent by a **truck driver** in the hotel's employ—who found it in his truck (T. 37). He had no contact with or authority from petitioner concerning any declaration of value or limitation of respondent's liability. This the respondent knew, as the truck driver expressly stated that he did not know the contents of the package and could declare no value upon it (T. 39, 26 and 64).

Under such facts, not only did the truck driver have no implied authority, but respondent was placed on notice of this fact.

The question of agency is nowhere covered in the Interstate Commerce Act—or even in respondent's rules and tariffs. It is a question governed by local law. *Plaff* v. *Pacific Express Co.*, 159 Ill. App. 493, 498.

The uniform law is that a truck driver, not in the

shipper's employ, has no implied authority to bind the shipper to a limitation of a carrier's liability in case of loss, as a carrier deals with an agent at his peril, and must take notice of the limitations which the law imposes upon his authority. *New* v. *Chicago, etc. Ry. Co.*, 171 Ill. App. 488; *Hill* v. *Adams Express Co.*, 77 N. J. L. 19, 71 Atl. 683; *Benson* v. *Oregon, etc. R. R. Co.*, 35 Utah 241, 99 Pac. 1072; *Seller* v. *Steamship, Pacific*, 21 Fed. Cas. No. 12,644, Deady 17, 1 Ore. 409; *Grice* v. *Oregon-Washington R. & N. Co.*, 78 Ore. 17, 150 Pac. 862; *Scranton* v. *Southern Pacific Ry. Co.*, 77 Cal. App. 132, 245 Pac. 1102; 10 C. J. 147, Sec. 186; 9 Am. Jur. 872, Sec. 736.

The court wholly ignored these decisions—and decided this question contrary to said decisions, including that of the federal court in the *Seller* Case.

Moreover, respondent knew that said truck driver had no authority to bind petitioner to a declared value. Respondent knew the truck driver was not in petitioner's employ, and he advised respondent that he didn't know anything about the contents or value of the package and could not declare any value on it. Respondent also knew that the customary procedure of filling out receipts with a declared value at the hotel had not been followed in this case. Respondent had both express and circumstantial notice of the truck driver's want of authority, and could not assert or rely upon an implied authority. 2 C. J. 575; 2 Am. Jur. 81, 85.

Finally the court rejected the trial court's finding that the truck driver (termed a roustabout) had no authority to bind petitioner to a declared value (T. 31, 47-49). In view of the undisputed facts supporting the trial court's finding, this refusal of the Appeals Court to be bound thereby was a violation of the established principle that a trial court's findings should not be disturbed when sup-

ported by evidence. *Chatz* v. *Armour Plant Employees Credit Union,* 154 F. (2d) 236, 239.

In holding that the non-existent hotel clerk was petitioner's agent to limit respondent's liability, the Appeals Court made no attempt to meet the above authorities—and its decision is contrary to all of them.

III.

PETITIONER NEVER RATIFIED THE RECEIPT.

The inference in said opinion that petitioner was bound by the receipt because she received and retained it without remonstrating is unfounded in fact and law. Petitioner never personally saw or knew of the receipt until after the loss was reported, and her husband never knew of or saw the receipt until the **next day after the coat had been shipped and lost** (or stolen) enroute! It was then too late to repudiate the shipment or recover back her coat, already shipped and lost. Complaint or repudiation at that stage would have been wholly unavailing. The law does not require one to perform a needless act.

All of the cases hold that a shipper's rights must be determined *before* the goods pass to the carrier and a loss occurs, and that the subsequent receipt and retention of a shipping receipt by the shipper, *after* the goods have been shipped and lost, cannot constitute an assent or bind the shipper thereto, as it is then too late for him to reject its terms and retrieve his goods. *Hunter* v. *American Ry. Express Co.,* (Mo. App.) 4 S. W. (2d) 847, 851; *Adams Express Co.* v. *Darden,* 265 U. S. 265, 267, 68 L. ed. 1010, 1013; *Merchant's Despatch Transportation Co.* v. *Joesting,* 89 Ill. 152, 155; *O. & M. Ry. Co.* v. *Hamlin,* 42 Ill. App. 441, 442; *Michigan Central R. R. Co.* v. *Boyd,* 91 Ill. 268, 272; *Waldron* v *Fargo,* 170 N. Y. 130, 136, 62 N. E. 1077, 1078;

Benson v. *Oregon S. L. R. R. Co.*, 35 Utah 241, 246-47, 99 Pac. 1072, 1074. In the *Hunter* case the court said:

> "In the absence of any evidence that plaintiff had knowledge that a bill of lading was issued until after the damage was done, we must hold that he is not bound by it. **His rights must be determined by what transpired before the time of the injury to the horse.** *American Express Co.* v. *Darden*, 265 U. S. 265, 44 S. Ct. 502, 68 L. ed. 1010." (Boldface type ours.)

The court's opinion herein is clearly contrary to these applicable decisions on this point.

IV.

DECISIONS OF THIS COURT WERE MISCONSTRUED.

The court thought the decisions cited in its footnote (T. 77) made the receipt binding on petitioner—even though she did not authorize or ratify it. None of said cases stand for such a proposition.

In the *Daniel* Case (269 U. S. 40), the receipt "was handed to and bound the sender of the goods"—obviously before the goods were lost. Moreover, and more important, the shipper expressly authorized her agent to declare a value in that case (See record in that case). The decision has no bearing on the situation here, where petitioner never authorized anyone to declare a value and never knew of the receipt until after the goods were shipped and lost.

In the *Carl* Case (227 U. S. 639), the shipper personally *signed* the receipt and limitation of liability, and then sought to avoid it on grounds of statutory invalidity.

In the *Croninger* Case (226 U. S. 491), the shipper personally delivered the goods and accepted the receipt, and the only question was what law governed.

And in the *Lindenburg* Case (260 U. S. 584), the shipper received, acted upon, assented to, and introduced the receipt in evidence "in support of his action"—and then tried to avoid it because he had not signed it.

None of said cases involve the question here presented, and certainly do not stand for the radical proposition that a carrier's rules can make its receipt binding on a shipper who has declared no value in writing.

The burden was upon respondent to obtain a written declaration or agreement as to value from petitioner if it wished to limit its liability in case of loss. *Hunter* v. *American Ry. Express Co.*, (Mo. App. 1928) 4 S. W. (2d) 847. Not having done so, respondent sought to override the statute by quoting its rules, receipts and filed tariffs.

The Circuit Court of Appeals held that respondent's rule was conclusive—thereby permitting a plain abrogation of the statute.

This decision opens the way for carriers to circumvent the statute, and deprives shippers of the protection Congress sought to afford them. The decision will affect thousands of shippers—and all interstate carriers. It presents an important federal question which has not been, but should be, settled by this court.

The decision of the Circuit Court of Appeals should be reversed, so as to correct the conflict with the *Caten* decision, and to restore to the shipper the statutory protection intended for him.

Respectfully submitted,

Karl Edwin Seyfarth

Counsel for Petitioner.

APPENDIX.

(49 U. S. C. A., Sec. 20, (11)).

Sec. 20, par. (11) *Liability of initial carrier for loss: limitation of liability; notice and filing of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory or the District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt, or bill of lading or to any party entitled to recover thereon,

whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: * * * *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this chapter; * * *

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Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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THE DARNELL-GARNER PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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REPLY BRIEF OF PETITIONER.

MAY IT PLEASE THE COURT:

If the reasoning of the respondent in its brief in opposition to our petition for certiorari is to be adopted, it would be tantamount to saying that Congress, in enacting the statute, did not mean what its plain language imports, but intended that the tariffs filed by respondent should control the limit of its liability. If this is what Congress

intended, it could easily have said that no shipper shall recover beyond the amount of $50 for loss or damage to any shipment, unless the shipper procures from the carrier a receipt declaring a higher value. Congress did not see fit to say so, but instead, as already pointed out, declared that no tariff, receipt, rule or regulation filed by the carrier shall be valid, which limits the liability of the carrier to the shipper, unless such limited liability or value is declared or agreed to *in writing* by the shipper. Neither rules, receipts, estoppel or other matter asserted by respondent can override the statute!

Respondent, in quoting the testimony of the witness Heinecke, picked one sentence out of all of his testimony instead of giving the full context, which we have endeavored to do in our petition. The record is short; the testimony undisputed. We have fairly presented the facts in our petition.

Respectfully submitted,

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208 S. La Salle St.,
Chicago 4, Illinois.

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CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OPPOSING CERTIORARI.

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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

PAGE

Statement of the Case 1

Summary of Argument 5

Argument 6

Conclusion 15

CITATIONS.

Cases.

Adams Express Co. v. Croninger, 226 U. S. 491, 504, 505, 508, 509 ..... 9, 11, 13

American Railway Express Co. v. Daniel, 269 U. S. 40 ..... 4, 6, 9, 10, 12, 14

American Ry. Express Co. v. Levee, 263 U. S. 19 9

American Railway Express Co. v. Lindenburg, 260 U. S. 584, 585, 587, 588, 589, 591, 592 ..... 6, 8, 9, 11, 12

Caten v. Salt City Movers and Storage Co., Inc., 149 Fed. 2d 428 ..... 4, 5, 8

C. N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319 9

C. & N. W. R. Co. v. Whitnack Co., 258 U. S. 369 9

C. & W. C. R. Co. v. Varnville Furniture Co., 237 U. S. 597 9

Davis v. Cornwell, 264 U. S. 560 9

Galveston Wharf Co. v. Ry. Co., 285 U. S. 127 9

Ga., Fla. & Ala. R. Co. v. Blish Milling Co., 241 U. S. 190 9

Great Northern Ry. Co. v. O'Connor, 232 U. S. 508, 514 12

Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 652 ..... 10, 11, 12
M. K. & T. R. Co. v. Harriman, 227 U. S. 657 9
N. Y. C. & H. R. R. R. Co. v. Beaham, 242 U. S. 148 ... 9
Peyton v. Railway Express Agency, 316 U. S. 350 ... 9
Pierce v. Wells Fargo & Co., 236 U. S. 278 ..... 9, 14
Plaff v. Pacific Express Co., 159 Ill. App. 493, 498 4
Securities and Acquisition of Control of Railway Express Agency, Incorporated, 150 I. C. C. 423 9
Southeastern Exp. Co. v. Pastime Amusement Co., 299 U. S. 28 9
Southern Express Co. v. Byers, 240 U. S. 612 9
Southern Ry. Co. v. Prescott, 240 U. S. 632 at 639 9

Statutes.

Interstate Commerce Act—Title 49 U. S. C.:
Section 6(1) 10
Section 6(7) 10
Section 10(1) 10
Section 10(2) 10
Section 10(3) 10
Section 16(13) 6
Section 20(11) 4, 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 469.

ANNE FEINBERG,

Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,

Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPPOSING BRIEF.

STATEMENT OF THE CASE.

Respondent opposes the petition for writ of certiorari because (1) the reasons relied on by petitioner as set forth on pages 4 and 5 of her petition are not supported by the facts and the law in the case, and (2) the decision of the Circuit Court of Appeals is sound.

The controversy is whether respondent's liability is the full value, $4,880.00, of petitioner's fur coat lost while in custody of respondent as an interstate carrier, or $50.00, the value declared in respondent's Uniform Express Receipt issued to the individual who delivered the fur coat packed in a carton to respondent for transportation.

Petitioner's summary statement of the matter (1) is incomplete in that it omits important tariff rules and the fact that neither petitioner nor her husband raised any objection to the valuation of $50.00 in the receipt until they were notified of the loss March 22, 1946, fifteen days after her husband received the receipt (R. 24, 25), and (2) inaccurately states that it was the custom for the hotel porter to fill out express receipts for hotel guests (petition p. 2) whereas the custom was that either the hotel porter or the employe who delivered the shipment to the Express office filled out the express receipts for hotel guests (R. 40). Therefore respondent sets forth the facts complete as to their importance to the propriety of certiorari.

On March 5, 1946, while a guest at the Arizona Biltmore Hotel, Phoenix, Arizona, petitioner's husband delivered her fur coat, enclosed in a carton and addressed to her furrier in Chicago, to a bellboy at the hotel with instructions to deliver it to respondent for transportation (R. 21, 22). He said nothing to the bellboy concerning the value or contents of the package, the payment of transportation charges, or any limitation of liability (R. 23).

On the same day Arthur Heinecke, a regular employe of the hotel for such purposes since 1929, transported the package with others to the office of respondent at Phoenix, Arizona (R. 37, 39, 40). Heinecke tendered the package to respondent's representative Cole, who asked him to state the contents and the value. Heinecke told Cole that he did not know anything about the contents and value and that Cole should "put on the minimum value which you allow, $50.00" (R. 39). On receipt of the package from Heinecke, respondent, through its agent Cole, filled out and delivered to Heinecke its Uniform Express Receipt showing a declared value of $50.00 [R. 38; defend-

ant's Exs. 1 and 2, R. 29, 30 and 45]. Heinecke testified, "If time permitted, the porter or myself usually filled out the receipts" and "I always got a receipt for every package I delivered to the Express Office. Sometimes these receipts were filled out by the Express office employee" (R. 41).

Petitioner's husband found the receipt in his mail box at the office of the hotel on March 7, 1946 (R. 24). He heard nothing further concerning the fur coat until March 22, 1946 when the agent of the Express Agency at Phoenix telephoned him and reported that the shipment had been stolen en route at El Paso, Texas, March 6, 1946 (R. 25, 26). When petitioner's husband received the Express Receipt from his mail box March 7, 1946 he placed it in his wallet and neither he nor petitioner read it until March 22, 1946 when they were advised of the loss (R. 24, 25, 44).

Respondent offered no evidence except its Uniform Express Receipt No. 6679 covering the shipment (defendant's Ex. 1, R. 45, offered in evidence R. 27, 29), a photostatic copy of said receipt and its tariffs.

The Terms and Conditions of the Uniform Express Receipt, physically a part of the receipt, are incorporated in and made a part of respondent's tariffs (defendant's Ex. 3, R. 30, I. C. C. No. 4500, p. 34). The Terms and Conditions of the Uniform Express Receipt and the tariffs are omitted from the printed record, but in accordance with stipulation of the parties may be referred to as though they were included therein (R. 66, 67).

Clause 2 of the Terms and Conditions of the Uniform Express Receipt and tariff Rules 2 and 13, important to the solution of the controversy, are set forth under Point I of this brief.

The crucial issue of the case is whether the value of

$50.00 set forth in the Express Receipt, issued at the time the hotel employe delivered the shipment to the Express Agency, constituted "the value declared in writing by the shipper or agreed upon in writing as the released value of the property" under Section 20(11) Title 49 U. S. C.

The respondent contends that the general federal law applies and on the basis thereof its liability is limited to $50.00. *American Railway Express Co.* v. *Daniel* 269 U. S. 40.

Petitioner contends that the local law, presumably the law of Illinois, applies, citing *Plaff* v. *Pacific Express Co.*, 159 Ill. App. 493, 498, and then inconsistently urges "The uniform law is that a truck driver, not in the shipper's employ, has no implied authority to bind the shipper to a limitation * * *" (petitioner's brief pp. 10, 11), citing state cases and one Federal District Court case which respondent urges are not in point because they concern intrastate shipments, or shipments made prior to 1906, the effective date of the Carmack Amendment, or other circumstances which distinguish them from the instant case.

Petitioner also urges, assuming no value was declared or agreed upon in writing, that respondent's tariff rules relied upon by the Circuit Court of Appeals were void. In support of this contention she cites *Caten* v. *Salt City Movers and Storage Co., Inc.*, 149 Fed. 2d 428 (Circuit Court of Appeals Second Circuit) and urges, as one of her grounds for certiorari, that the decision in that case is in direct conflict with the decision of the Seventh Circuit in the instant case. That there is no conflict is made clear in Point II of this brief.

SUMMARY OF ARGUMENT.

I.

The tariff rules are valid and in harmony with the statute.

II.

Caten v. *Salt City Movers and Storage Co., Inc.*, 149 Fed. 2d 428, is not in conflict with the decision of the Circuit Court of Appeals Seventh Circuit in the instant case.

III.

The limitation is binding upon petitioner.

IV.

Petitioner is estopped from recovering a greater sum than $50.00.

ARGUMENT.

I.

The Tariff Rules Are Valid and in Harmony With the Statute.

Respondent's tariffs were accepted in evidence without objection (defendant's Ex. 3, R. 30). The tariffs were certified by the Interstate Commerce Commission and any objection to the admission thereof in evidence would have been unavailing. Section 16(13) Title 49 U. S. C.; *American Railway Express Co.* v. *Daniel*, 269 U. S. 40; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584 at 589. The Terms and Conditions of the Uniform Express Receipt, physically a part of the receipt and also a part of the tariffs, and the tariffs because of their bulk were not included in the printed record but, pursuant to stipulation (R. 66, 67) may be referred to as though printed.

Clause 2 of the Terms and Conditions of the Uniform Express Receipt provides:

> "In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared

and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value."

Tariff Rule 2 provides:

"A receipt of the form prescribed herein must be given for all matter received. The value of the property must be declared by the shipper, and inserted in the receipt. The shipper's declaration of such value may be made by inserting 'not exceeding $50.00,' or 'not exceeding 50 cents per pound, actual weight,' as the case may be, in the blank space in that portion of the receipt reading 'value herein declared by shipper to be ..... Dollars.'

"When the value so declared exceeds $50.00 as to shipments weighing 100 pounds or less, or exceeds 50 cents per pound as to shipments weighing over 100 pounds, the value must be marked by the shipper upon the shipment."

Tariff Rule 13 provides:

"(a) Rates named in tariffs governed by this Classification, except as to ordinary live stock, are dependent upon and vary with the declared or released value of the property, and, except as to articles provided for in Rule 13(b) and except as to live animals, live stock and other live creatures provided for in Rule 13(c), are based upon property declared to be of, or released to, a value not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for any shipment in excess of 100 pounds. When the declared or released value exceeds that above stated, the charges are 10 cents greater for each $100 or fraction thereof in excess of the value stated above."

[13(b) concerns carvings, ceramics, pastels, pictures, sculpture, statuary, etc. It does not concern fur coats.]

These tariffs on their face offer a choice of rates depend-

ent upon value which, by reason of Clause 2 of the receipt and tariff Rule 2, must be declared or agreed upon in writing. The case of *Caten* v. *Salt City Movers and Storage Co., Inc.*, 149 Fed. 2d 428, relied upon heavily by petitioner, is not in point. In that case the validity of the contract, if any, limiting liability, was held invalid. The validity of the tariffs was not questioned.

It is clear that under Section 20(11) Title 49 U. S. C., set forth in the Appendix of the petition, the tariffs complained of by petitioner are valid. *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584 at 587, 588, 589.

II.

Caten v. Salt City Movers and Storage Co., Inc., 149 Fed. 2d 428, Is Not in Conflict With the Decision of the Circuit Court of Appeals, Seventh Circuit, in the Instant Case.

In the *Caten* case there was no question of agency. As the court in that case said at page 432 of 149 Fed. 2d:

> "All that took place respecting valuation occurred in the two telephone conversations, one after the shipment was weighed in Syracuse before the van left and the other after it had been destroyed by fire, the latter being too late, of course, to count as a valuation upon which the rate was based."

No bill of lading or shipping receipt ever was given petitioner or any agent representing petitioner. The opinion does not show what the terms of the carrier's receipt or bill of lading were. In the *Caten* case no value was declared or agreed upon in writing.

In the instant case the value of $50.00 was placed in the receipt pursuant to the instructions of petitioner's agent who delivered the shipment to the carrier, and the receipt was delivered to petitioner's agent and accepted by her husband without complaint until after knowledge of the loss. The material difference between the two cases is plain.

III.

The Limitation Is Binding Upon Petitioner.

Respondent is a common carrier subject to Part 1 of the Interstate Commerce Act. *Securities and Acquisition of Control of Railway Express Agency, Incorporated,* 150 I. C. C. 423. By the enactment of the Carmack Amendment to the Interstate Commerce Act (Section 20 (11) Title 49 U. S. C.) Congress in 1906 embraced the issue of liability on interstate shipments by express within the fold of the federal law requiring uniformity and a construction of interstate transportation contracts consistent with the purpose of the Interstate Commerce Act to do away with all forms of unjust discrimination. *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 504, 505; *Southern Ry. Co.* v. *Prescott,* 240 U. S. 632 at 639. See also:

M. K. & T. R. Co. v. *Harriman,* 227 U. S. 657.

Pierce v. *Wells Fargo & Co.,* 236 U. S. 278.

C. & W. C. R. Co. v. *Varnville Furniture Co.,* 237 U. S. 597.

Southern Express Co. v. *Byers,* 240 U. S. 612.

Ga., Fla., & Ala. R. Co. v. *Blish Milling Co.,* 241 U. S. 190.

C. N. O. & T. P. R. Co. v. *Rankin,* 241 U. S. 319.

N. Y. C. & H. R. R. R. Co. v. *Beaham,* 242 U. S. 148.

C. & N. W. R. Co. v. *Whitnack Co.,* 258 U. S. 369.

American Ry. Express Co. v. *Lindenburg,* 260 U. S. 584.

American Ry. Express Co. v. *Levee,* 263 U. S. 19.

Davis v. *Cornwell,* 264 U. S. 560.

American Ry. Express Co. v. *Daniel,* 269 U. S. 40.

Galveston Wharf Co. v. *Ry. Co.,* 285 U. S. 127.

Southeastern Exp. Co. v. *Pastime Amusement Co.,* 299 U. S. 28.

Peyton v. *Railway Express Agency,* 316 U. S. 350.

Respondent, by Section 6 (1) of the Interstate Commerce Act, was obliged to publish and file with the Interstate Commerce Commission schedules showing the rates, charges and classifications and "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the * * * shipper."

By Sec. 6 (7) of the same Act it is made unlawful for any common carrier subject to Part 1 of the Act to "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time" or to "extend to any shipper * * * any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

By Sec. 20 (11) of the same Act the carrier was and is bound to issue a receipt.

By Sec. 10 (1) of the same Act it is made a criminal offense for a carrier to wilfully omit or fail to do anything required of it by the Act.

By Sec. 10 (2) and (3) of the same Act it is made a criminal offense for either the carrier to give or a shipper or consignee to receive or obtain, knowingly and wilfully, transportation services at less than the regular rates established and in force.

The rates when filed and published are equally binding upon the shipper and the carrier and both are charged with knowledge of them. *American Railway Express Co.* v. *Daniel*, 269 U. S. 40. As said in *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 652:

> "The rate, when made out and filed, is notice, and its effect is not lost, although it was not actually posted

> in the station. * * * The shipper's knowledge of the lawful rate is conclusively presumed."

The limitation clause in the Uniform Express Receipt and the respondent's tariffs provide that in the event of no declaration of value, the carrier's liability is limited to $50.00. Where the value declared is higher than $50.00, the rate charged is correspondingly higher. The shipper, bound to a knowledge of the law and respondent's tariffs, and having failed to instruct her agent to declare a value in excess of $50.00 is bound by the limitation to the same extent as if she personally had delivered the package to respondent and had declared no value. Her agent evidently realized this and told respondent's representative receiving the package to "put on the minimum value which you allow, $50.00" (R. 39). See *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584.

Petitioner knew, or should have known, as a matter of law that respondent would issue a receipt to her agent and that in the absence of any declared value, Clause 2 of the Terms and Conditions of the receipt would limit her recovery for loss of or damage to her shipment to $50.00.

The Supreme Court said in the case of *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 652:

> "The valuation declared or agreed upon *as evidenced by the contract of the shipment upon which the published tariff rate is applied*, must be conclusive in an action to recover for loss or damage a greater sum." (Emphasis ours.)

Knowing that petitioner was charged with knowledge of the provisions in Clause 2 of the Terms and Conditions of the Uniform Express Receipt, respondent and petitioner's agent rightfully considered that she wished the package transported with the declared or agreed value of $50.00

which took the minimum rate. *American Railway Express Co.* v. *Daniel,* 269 U. S. 40; *American Railway Express Co.* v. *Lindenburg,* 260 U. S. 584, 585, 591, 592.

Petitioner's agent has breached no instruction of the petitioner. To the contrary he has followed her instructions implicitly; and those instructions by implication of law required the transportation at a declared value of $50.00, and at the minimum rate. The receipt when delivered to petitioner's agent constituted the written declaration or agreement from petitioner as to a declared value.

Even if the hotel driver had ben expressly instructed by petitioner to declare a value higher than $50.00, petitioner would be bound by the limitation because she or her husband, certainly her agent for all purposes of the shipment, accepted the receipt and took no exception thereto until after notice of the loss. The carrier is not bound by any private instructions issued to her agent by the shipper. *American Railway Express Co.* v. *Daniel,* 269 U. S. 40; *Great Northern Ry. Co.* v. *O'Connor,* 232 U. S. 508, 514.

IV.

Petitioner Is Estopped from Recovering a Greater Sum Than $50.00.

Broadly stated, the rule is that shipper may not declare a value and obtain the benefit of a lower rate and then after loss repudiate the declaration and recover more than the sum named by him for the purpose of securing the lower rate.

As was said in the case of *Kansas City Southern Ry. Co.* v. *Carl,* 227 U. S. 639, 652, and quoted with approval in the case of *American Railway Express Co.* v. *Lindenburg,* 260 U. S. 584, 592:

"To permit such a declared valuation to be over-

> thrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

The Record shows no fraud, no duress, no imposition upon the shipper or her agent by the carrier. She made no effort to change the valuation and evidenced no interest in it until sixteen days after the loss, that is, when she first received knowledge thereof. The carrier was entitled to presume that she would adequately instruct her agent and that in the absence of knowledge on his part she wished to ship at the lowest rate, that is, the one carrying a liability limited to $50.00.

There is certainly no evidence in the case to suggest that the transaction was not knowingly entered into, because, if for no other reason, the law required the shipper to know all that appertained to what was actually done. There is no evidence to suggest that the shipper did not understandingly do what was done, nor could there be any such suggestion, because the law required her to understand that there were different rates based upon valuation. There is nothing to suggest that what was done was not freely done, nor could such a suggestion be made. The shipper had the right under the filed tariffs to name whatever value she desired to name on the shipment, and to pay the rate lawfully affixing thereto. There is no suggestion that the shipper was denied this right.

As said in the case of *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 508-9:

> "That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case.

> The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars, unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the public schedules filed with the Commission."

The value declared is binding regardless of the actual value of the shipment. *George N. Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278.

The case of *American Railway Express Co.* v. *Daniel*, 269 U. S. 40 is squarely in point. Petitioner erroneously states that the receipt in the *Daniel* case was delivered to the sender of the goods before the goods were lost and therefore the *Daniel* case is not in point, or at least is not controlling. Actually in the *Daniel* case the court merely said that the receipt "was handed to and bound the sender". Whether it was handed to the sender of the goods before or after the loss does not appear in the *Daniel* case and was not material so long as she or her general agent accepted it. In the instant case the receipt was accepted by petitioner's husband on her behalf fifteen days prior to knowledge of the loss and neither he nor petitioner raised any objection to it. Petitioner further urges that in the *Daniel* case the shipper's agent was expressly authorized to declare a value. If such were the fact, the authorization was for the declaration of a value in excess of $50.00 to which the Supreme Court limited the recovery.

Estoppel stems from good faith. Had the shipment been delivered to the consignee in good order respondent could have collected only those transportation charges predicated on a valuation of $50.00. If petitioner intended to declare the full value of her coat and to pay the transportation charges appertaining thereto, it was her duty to advise respondent as soon as she had knowledge or should

have had knowledge of any declared value different from that which she intended.

Conclusion.

Certiorari should be denied.

Respectfully submitted,

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